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In the Supreme Court of the United States

OCTOBER TERM, 1985

MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) provides that the Secretary of Commerce shall certify if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) contains an analogous certification provision that requires the imposition of severe economic sanctions against countries that the Secretary of Commerce certifies are conducting whaling operations that "diminish[] the effectiveness of the International Convention for the Regulation of Whaling." 16 U.S.C. 1821(e)(2). The questions presented are:

1. Whether the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify Japan, an important foreign ally culturally and historically committed to whaling, which presently declines to follow international whale harvesting quotas but has entered into an agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988.

2. Even if the Secretary of Commerce does have such a non-discretionary duty to certify, whether the issuance of a writ of mandamus ordering certification is appropriate in the circumstances of this case.

PARTIES TO THE PROCEEDING

The petitioners are: Malcolm Baldrige, Secretary of Commerce; and George Shultz, Secretary of State. The respondents are:

American Cetacean Society;
Animal Protection Institute of America;
Animal Welfare Institute;
Center for Environmental Education;
The Fund for Animals;
Greenpeace U.S.A.;
The Humane Society of the United States;
International Fund for Animal Welfare;
The Whale Center;
Connecticut Cetacean Society;
Defenders of Wildlife;
Friends of the Earth;
Thomas Garrett;
Japan Whaling Association;
Japan Fisheries Association.

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In the Supreme Court of the United States

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v.

AMERICAN CETACEAN SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Commerce and the Secretary of State, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-55a) is reported at 768 F.2d 426. The opinion of the district court (App. 56a-84a) is reported at 604 F. Supp. 1398.

JURISDICTION

The judgment of the court of appeals (App. 90a-91a) was entered on August 6, 1985. Petitions for

rehearing were denied on October 11, 1985 (App. 92a-99a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 8(a) of the Fishermen's Protective Act (Pelly Amendment) provides in relevant part (22 U.S.C. 1978(a)):

> (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
>
> * * * * *
>
> (4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) * * * from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (Packwood Amendment) provides in relevant part (16 U.S.C. 1821(e)(2)):

> (A) For the purposes of this paragraph—
>
> (i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing

operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)).

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) that—

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

STATEMENT

Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) provides that the Secretary of Commerce shall certify if the nationals of a foreign country "are conducing fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) contains an analogous certification provision that requires imposition of severe economic sanctions against countries that

the Secretary certifies are conducting whaling operations that "diminish[] the effectiveness" of the International Convention for the Regulation of Whaling (ICRW). 16 U.S.C. 1821(e)(2).

At issue in this case is whether the Pelly and Packwood Amendments allow the Secretary no discretion in determining whether to certify an ICRW party that formally objects to and departs from whale harvesting quotas. A coalition of private wildlife organizations (respondents) contends that the Secretary must automatically certify any country that departs from the quotas, regardless of the seriousness of the departure and regardless of mitigating circumstances. The court of appeals agreed and approved the issuance of a writ of mandamus ordering the Secretary to certify Japan. That order would require the imposition of drastic economic sanctions upon an important foreign ally culturally and historically committed to whaling. Moreover, it would require those sanctions to be imposed upon a country that has entered into an agreement with the United States, already partially performed, to rescind its objections and effectively terminate its commercial whaling industry by April 1, 1988.

1. The International Convention for the Regulation of Whaling (ICRW), 62 Stat. 1716 (*entered into force* Nov. 10, 1948), establishes a multi-national program to promote the conservation and development of whale populations. The ICRW includes a Schedule regulating whaling practices and setting harvest limits for various species. Art. I, 62 Stat. 1717; see 62 Stat. 1723-1727. In addition, the ICRW creates the International Whaling Commission (IWC), an international deliberative body that implements portions of the convention. Art. III, 62 Stat. 1717-1718.

Among other responsibilities, the IWC amends the Schedule, including the harvest limits, to promote optimum utilization of whale resources. Art. V, 62 Stat. 1718-1719. The ICRW expressly provides that a member country may file objections to IWC amendments of the Schedule. *Id.* at 1719. In the event that a country files a timely objection, it is under no obligation to comply with the amendment; however, the amendment will apply to non-objecting countries. *Ibid.*

In 1981, the IWC proposed a "zero-catch" harvest limit for certain sperm whales taken exclusively by Japanese whalers (App. 11a, 45a-46a, 65a). Soon thereafter, the Government of Japan filed a timely objection (*ibid.*). The IWC subsequently revised its quota, permitting Japan to harvest additional sperm whales in the 1982 and 1983 coastal seasons but reinstating the "zero-catch" limit in the following year (*id.* at 11a-12a, 46a, 65a-66a). Japan, in response, continued its objection (*ibid.*).

In 1982, the IWC adopted a moratorium on all commercial whaling effective at the end of the 1984/1985 pelagic whaling season (which terminated in spring 1985) for high seas whaling and at the end of the 1985 coastal season (which terminates near the end of March 1986) for coastal whaling (App. 11a, 47a, 66a). The moratorium was approved as a conservative management measure that is scheduled for IWC review in 1990, but will remain in effect until changed by a three-fourths majority vote of the IWC. Japan, Norway, and the Soviet Union filed timely objections to the moratorium (*id.* at 11a).

In autumn 1984, the United States communicated to Japan that the taking of sperm whales by Japanese nationals could result in certification under the Pelly

and Packwood Amendments. As Japan realized, if the Secretary of Commerce determined that certification was in order, the Secretary of State would reduce, by at least 50 percent, Japan's fishery allocation in United States waters. 16 U.S.C. 1821(e)(2)(B). Japan therefore entered into discussions with the Departments of Commerce and State to explore possible accommodation of the two nations' concerns (App. 12a).

On November 13, 1984, an executive agreement was concluded by Japan and the United States through an exchange of letters between the Charge d'Affairs of Japan and the Secretary of Commerce (App. 102a-109a). Subject to implementation (as described in note 1, *infra*), the Government of Japan pledged to limit strictly and ultimately discontinue its nation's commercial whaling activities (*id.* at 102a-106a). In response, the Secretary concluded, based upon review of reports by IWC's Scientific Committee and upon consultation with the United States Commissioner to the IWC, that Japan's short-term continuance of limited whaling, leading to a complete phase-out of its commercial whaling industry, would not "diminish the effectiveness" of the ICRW (*id.* at 107a-109a). The Secretary therefore informed Japan that certification would not be necessary provided that Japan complied with its pledge (*ibid.*).[1]

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[1] Japan's two specific undertakings were explained in a summary accompanying the Japanese Charge d'Affairs' letter (App. 104a-106a). First, it was agreed that if Japan would withdraw its objection to the IWC's "zero-catch" sperm whale quota, Japanese whalers could harvest up to 400 sperm whales during each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13,

On December 11, 1984, Japan fulfilled the first condition of the agreement by withdrawing its objection to the IWC's sperm whale quota, effective April 1, 1988 (App. 110a, 112a-114a). That irrevocable action will bring to an end Japanese commercial sperm whaling activities.

2. The United States and Japan both expressed satisfaction with a compromise that provided a mutually acceptable accommodation of their respective sovereign responsibilities. However, the agreement failed to satisfy several private wildlife organizations, which urged the United States to coerce Japan, through non-negotiable imposition of severe economic sanctions, to abandon immediately its whaling industry. Several days before consummation of the November 13, 1984 executive agreement, respondents, led by Greenpeace U.S.A., filed suit in the United States District Court for the District of Columbia, requesting a writ of mandamus to compel the Secretary to certify Japan. Japanese whaling and fishing associations (intervenors) intervened.

1984, effective on April 1, 1988. This undertaking would effectively end Japanese commercial sperm whaling.

Second, it was agreed that if Japan would end *all* commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Under that agreement, Japan would harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would limit its harvest of other whales —under limitations acceptable to the United States, using the most recently voted IWC quota for those whales as a guideline—through the end of the 1986/87 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate all commercial whaling operations by withdrawing its objection to the IWC moratorium, on or before April 1, 1985, effective April 1, 1988.

On March 5, 1985, the district court granted summary judgment for respondents and ordered the Secretary to certify Japan immediately (App. 56a-86a). The district court observed that the Secretary was required to certify nations that "diminish the effectiveness" of the ICRW, but noted that neither the Pelly nor the Packwood Amendment defined that key phrase (*id.* at 68a-69a). The court nevertheless concluded that Congress, in using that phrase, intended to deprive the Secretary of any discretion to withhold certification whenever a country exceeds, in any amount and under any circumstances, an IWC harvest quota (*id.* at 83a-84a, 85a-86a). The district court denied the government's motion for a stay pending appeal; however, the court of appeals granted a stay on March 18, 1985 (*id.* at 87a-89a). Shortly thereafter, on April 5, 1985, the Government of Japan informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the district court's order (*id.* at 116a-119a).

On August 6, 1985, a divided court of appeals upheld the district court order requiring the Secretary to certify Japan (App. 1a-55a). The court found that the Pelly and Packwood Amendments did not define the specific activities that would "diminish the effectiveness" of the ICRW; it therefore looked for enlightenment in the legislative history (*id.* at 22a). Based on its examination of that history (*id.* at 22a-41a), the court concluded that the Secretary has no discretion in determining whether to certify a nation whose whalers depart from the IWC harvest quotas. It stated (*id.* at 41a-42a):

> Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se*, diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifically, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

The court of appeals concluded that mandamus was appropriate because "the Secretary had a nondiscretionary duty in these circumstances to certify Japan" (*id.* at 42a).

Judge Oberdorfer, sitting by designation, dissented (App. 45a-55a). He observed that this dispute involved delicate foreign relations issues directly affecting the United States' relations with Japan (*id.* at 49a-51a). He stated that the foreign repercussions of this dispute "heighten the need for forbearance by the courts in the absence of a clear command from Congress" (*id.* at 51a). In his view, the legislative history relied upon by the court was "far from conclusive" (*id.* at 52a) and "does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis a vis* the [IWC] quota and the moratorium 'diminishes the effectiveness' of the Convention" (*id.* at 53a). Furthermore, he concluded that a mandamus remedy was inappropriate in light of the international relations implications and equities of the case (*id.* at 54a-55a).

The court sua sponte stayed issuance of its mandate for 90 days from the date of the opinion in light of "the circumstances of this case" (App. 44a).

The government and the intervenors petitioned for rehearing and suggested rehearing en banc. On October 11, 1985, the court of appeals denied the petitions for rehearing (*id.* at 92a-93a, 96a-97a). The suggestions for rehearing en banc were circulated to the full court. Of the circuit's nine active judges, four supported en banc review, expressing substantial agreement with Judge Oberdorfer's dissent. Three judges voted against en banc rehearing and two judges recused themselves. Thus, the en banc suggestions obtained the concurrence of a majority of the participating judges but a minority of active judges and were therefore denied (*id.* at 94a-95a, 98a-99a). On November 6, 1985, the court granted an extension of its stay through December 4, 1985 (*id.* at 100a-101a).

REASONS FOR GRANTING THE PETITION

This case presents an important question of international consequence. The court of appeals' decision repudiates an executive agreement between the United States and Japan and requires imposition of drastic economic sanctions against an important ally and trading partner. The decision erroneously rejects a reasonable interpretation of the Pelly and Packwood Amendments by the officials responsible for their administration, it dismantles a constructive approach to enforcement of international conservation programs, and it results in unwarranted judicial intervention in the conduct of foreign affairs. The court's decision reflects a marked departure from the "classical deference" afforded the political branches in matters of foreign policy (*Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19) and plainly merits this Court's review.

1. The United States and Japan have successfully employed cooperative diplomacy to resolve the delicate issue of Japanese whaling. The resulting executive agreement—already partially performed—will lead to the effective termination of Japan's commercial whaling industry by April 1, 1988. This agreement is a salutary and positive achievement. It advances the United States' interest in preserving whale populations. But it also recognizes that our ally Japan, an island nation historically and culturally tied to whaling, faces a difficult transition period in shutting down a significant domestic industry. As Japan's Charge d'Affaires noted, the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling" (App. 103a).

It is apparent that the court of appeals' decision, if left standing, would have serious foreign relations implications. An agreement between nations—already partially performed—would be repudiated. Japan would face severe economic sanctions and domestic dislocations. International comity could more generally be impaired, since other nations might doubt the United States' ability to resolve international disputes through diplomacy and negotiation, free from judicial intervention. Japan stands ready to complete its obligations under the agreement (App. 116a-119a). A divided court of appeals should not have the last word on this important matter, particularly when the majority of participating members have expressed disagreement with the result.

2. The court of appeals' decision not only raises serious foreign relations implications, it is also wrong. The court holds that the Pelly and Packwood Amend-

ments require the Secretary automatically to impose severe economic sanctions whenever a foreign country departs from an IWC harvest quota, regardless of attendant circumstances and regardless of the departure's effect on the international conservation effort. The court admits that the statutory language of the Pelly and Packwood Amendments does not expressly require automatic certification (App. 22a) —even though they obviously could have been drafted to require that result for any refusal to observe harvest quotas. Indeed, the statutory language provides only that the Secretary shall certify countries if he determines that their activities "diminish the effectiveness" of the ICRW. 22 U.S.C. 1978(a)(1); 16 U.S.C. 1821(e)(2)(A)(i). The court nevertheless concludes that Congress granted the Secretary no discretion to judge whether a quota departure "diminish[es] the effectiveness" of the ICRW. It surmises that Congress intended, instead, that "where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary" (App. 42a).

The court of appeals ignored the obviously discretionary content of the words Congress used. Congress, recognizing the President's preeminent role in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936). "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign rela-

tions, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324. The Pelly and Packwood Amendments, which employ a standard that relies upon an Executive Branch determination that certain activities "diminish the effectiveness" of international conventions, exhibit the traditional congressional deference to executive judgment in a matter affecting foreign affairs.

The court of appeals attempted to divine a more restrictive meaning of the statutory language by examining isolated passages of the Pelly Amendment's legislative history (App. 22a-25a). However, none of the passages it cites expressly states that the Secretary must automatically certify every nation that departs in any way from an international harvest quota. Its chief support (*id.* at 22a), an introductory passage in the Senate report accompanying the Pelly Amendment, states only that the Secretary must certify nations that he determines "do not conduct their fishing operations in a manner that is consistent with international conservation programs." S. Rep. 92-582, 92d Cong., 1st Sess. 2 (1971). This statement, which is not repeated in the report's section-by-section analysis (*id.* at 5), falls far short of an express directive that the Secretary must always certify every nation that departs from an international quota. The other passages that the court cites (App. 22a-25a) simply support the uncontested proposition that the Pelly Amendment *authorizes* the imposition of sanctions upon nations that violate fishing quotas. No one disputes that this authority exists. The government fully agrees that the Pelly and Packwood Amendments permit penalization of nations that

fail to behave in a manner consistent with international conservation programs. We also agree that in many cases a foreign country's departure from harvest quotas will indeed diminish the effectiveness of a conservation treaty and result in certification. But the legislative history does not support the court's conclusion that certification is mandatory and non-discretionary in every case presenting a departure from IWC harvest quotas.

The court of appeals also relied (App. 26a-29a) on the 1962 amendments to the Tuna Convention Act of 1950, 16 U.S.C. 951 *et seq.*, to inform its definition of the phrase "diminish the effectiveness." Its analysis of that statute, a precursor of the Pelly Amendment, led it to conclude: "If a foreign country failed to implement the harvest recommendations, that failure would automatically result [in] imposition of the statutory sanctions on the foreign country" (App. 28a). That description, however, is incorrect. The pertinent regulations implementing the Tuna Convention Act (50 C.F.R. 281.5), do not provide automatic sanctions for failure to observe harvest quotas.[2] The regulations instead call for the exercise of considered judgment.[3]

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[2] The court acknowledged these regulations (App. 28a n.16) but failed to heed their content. The regulations list a series of factors that are taken into account, "among such other considerations as may appear to be pertinent," in determining whether a country will be found to have diminished the effectiveness of the conservation program. 50 C.F.R. 281.5 Those regulations, first promulgated in 1966, (see 31 Fed. Reg. 16096), demonstrate the long-standing recognition that the phrase "diminish the effectiveness" necessarily entails a substantial measure of discretion.

[3] Furthermore, the court incorrectly interpreted the Department of the Interior's explanation to Congress concerning how

The court also placed reliance (App. 32a-37a) on the floor statements of congressmen supporting passage of the Packwood Amendment. These brief general statements indicate the sponsors' intent to put "economic teeth into our whale conservation efforts" and to permit imposition of sanctions against countries whaling "in disregard" of IWC regulations. See 125 Cong. Rec. 21742 (1979) (Sen. Packwood); see also *id.* at 21743 (Sen. Magnuson); *id.* at 22082-22084 (Reps. Murphy and Oberstar). We fully agree that the Packwood Amendment advances these general goals through its authorization of sanctions. The floor statements are therefore fully consistent with our position in this case. They are, however, merely addressed to the broad general purposes of the legislation, and do not shed light on the meaning of the specific terms of the Amendment here at issue. As this Court has explained, statements by individual congressmen, "unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself." *Regan* v. *Wald*, slip op. 14. The brief statements cited by the court of appeals do

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it would administer the statute. The Department (whose commercial fisheries management responsibilities were subsequently transferred to the Department of Commerce) explained that it would first seek assurance from foreign countries that they would take "adequate action" and that it then would institute the certification procedure only if a country failed to respond to notification that it was not following through on its commitment. See S. Rep. 1737, 87th Cong., 2d Sess. 7-8 (1962). Thus, the Department's use of the term "adequate action" and its indication that it would first pursue discussion and persuasion rather than automatic imposition of sanctions strongly contradict the court of appeals' interpretation (App. 27a-28a) of Interior's position.

not address the specific issue in this case—whether the Secretary may exercise discretion in determining whether departures from harvest quotas "diminish the effectiveness" of the ICRW. The court thus gave undue weight to tangential floor statements of negligible relevance. Moreover, the court, while relying on the general observations of Senators Packwood and Magnuson, rejected (App. 36a n.20) the relevance of the much more specific observations of Representative Breaux, chairman of the House Committee that had primary responsibility for the bill. Representative Breaux, who necessarily understood the operation of the certification process, emphasized the discretionary content of the term "diminish the effectiveness," stating "I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disastrous effects on our U.S. fishing industry." 125 Cong. Rec. 22083 (1979).

The court discounted other portions of the legislative history that contradict its restrictive interpretation of the relevant statutory language. For example, the Pelly Amendment was modified in 1978 to provide for certification of countries that "diminish the effectiveness" of international treaties protecting endangered species. See 22 U.S.C. 1978(a)(2); Pub. L. No. 95-376, § 2, 92 Stat. 714. The House report accompanying the bill stated:

> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the find-

> ing that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.

H.R. Rep. 95-1029, 95th Cong., 2d Sess. 15 (1978). This statement expressly indicates the need for Executive Branch discretion in determining whether a violation of a convention provision "diminish[es] the effectiveness" of a conservation program. Furthermore, it is the only passage in the legislative reports that expressly addresses how the crucial phrase "diminish the effectiveness" should be applied. In addition, it was written only a year before the same statutory phrase was adopted in the Packwood Amendment. Yet the court of appeals dismissed this statement as irrelevant, concluding that the phrase "diminish the effectiveness" has a different meaning depending on whether it is applied to endangered species treaties or fishery related treaties (App. 38a-39a). It based this distinction, which it admitted might appear "overly formalistic" (*id.* at 39a), upon a mistaken understanding of the content of endangered species treaties.[4] But even if its description of

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[4] The court stated that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, "operates in a manner entirely different from that of [the] original Pelly Amendment" (App. 39a). Whatever that statement means, it is clear that CITES *does* operate in a manner essentially identical to the fishing and whaling conventions. And contrary to the court's statement (*ibid.*), CITES *does* provide for generally applicable regulations that are adopted through procedures substantially identical to those employed in the ICRW.

CITES regulates trade in endangered and threatened species through inclusion of those species in Appendix I (covering

the relevant treaties were correct, it simply strains credulity to believe that Congress intended a single phrase to have such significantly different meanings in two adjoining subsections. See *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, No. 84-648 (July 1, 1985), slip op. 9.

As this discussion shows, the court of appeals failed to recognize the inherently discretionary content of the phrase "diminish the effectiveness." It chose, instead, to adopt an unnecessarily restrictive interpretation of that language, relying upon a strained reading of the legislative history and neglecting indications of contrary legislative intent. The court's restrictive interpretation "does undue violence to the words chosen by Congress." *Regan* v. *Wald*, slip op. 12. If Congress had wished to impose a mandatory, non-discretionary duty upon the Secretary, "it could easily have done so explicitly." *Id.* at 13. The fact that it did not do so indicates that Congress intended

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endangered species) and Appendix II (covering threatened species). CITES art. II-IV, 27 U.S.T. 1092-1097. Compare ICRW art. V, 62 Stat. 1718-1719 (regulating whaling through the use of a Schedule). CITES requires a two-thirds majority vote to amend an Appendix to include additional species. CITES art. XV, 27 U.S.T. 1110-1112. Compare ICRW art. III, 62 Stat. 1717 (requiring a three-fourths majority vote to amend the Schedule). A nation may object to inclusion of a species within an Appendix; if it timely objects, it is expressly exempted from compliance with the CITES requirements governing import and export of that species. CITES art. XV, 27 U.S.T. 1110-1112. Compare ICRW art. V, 62 Stat. 1719 (containing an analogous exemption provision). Thus, a nation that objects to the inclusion of a particular species within a CITES Appendix and then, for example, allows trade without the import and export permits required by CITES, is in the same position as a nation that objects to an IWC Schedule amendment and permits whaling in contravention of its requirements.

the Secretary to retain flexibility in exercising his certification authority. *Ibid.*

Moreover, the legislative history does not support the court of appeals' interpretation. The legislative history contains no express, authoritative statement that the Secretary must always certify a country that departs from the IWC quotas. As the discussion above demonstrates, the court relied on nothing more than doubtful inferences from ambiguous legislative statements. In these circumstances, the court should have deferred to the reasonable interpretation of the Executive Branch department charged with administering the statute. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 4-5. Indeed, judicial deference to the Executive Branch takes on particularly weighty significance in the case of statutes, such as the Pelly and Packwood Amendments, that directly affect international relations. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963). The importance of that principle could hardly be more strongly demonstrated than it is in the present case, where, in good faith reliance on a reasonable construction of those Amendments, the Executive Branch undertook and successfully completed delicate international negotiations culminating in a solemn agreement between sovereigns. Particularly in these circumstances, the court of appeals' refusal to apply the judiciary's "classical deference to the political branches in matters of foreign policy" (*Regan* v. *Wald*, slip op. 19) was both unfortunate and unsound.

Furthermore, even if it were true that the Secretary has a mandatory, non-discretionary duty to certify nations that depart from whale harvesting quo-

tas, the court's authorization of mandamus would nevertheless constitute a clear abuse of discretion. It is, of course, well established that "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955). As Judge Oberdorfer observed (App. 55a), the lower court failed to address the institutional and equitable considerations that should guide a court's exercise of discretion in cases involving Executive Branch judgment in matters of foreign affairs.

In particular, this Court has made clear that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). See also, *e.g.*, *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208-210 (D.C. Cir. 1985); *Adams* v. *Vance*, 570 F.2d 950, 954 (D.C. Cir. 1977). In the present case, mandamus would result in the judicial repudiation of an international agreement—already partially performed—that prevents a confrontation among allies, that rests upon a wholly reasonable construction of the Pelly and Packwood Amendments, and that advances the underlying purpose of those statutes. Plainly, mandamus is not warranted in the present case.

3. Finally, we note that the court of appeals' decision establishes a troubling precedent with potentially far-reaching consequences. In the specific context of whale conservation, it prevents the Executive Branch from applying its special knowledge of foreign relations, conservation dynamics, and treaty re-

quirements to assure the maximum effectiveness of the ICRW. A strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts. Additionally, it may result in certification of countries that depart from IWC requirements that the United States itself considers unreasonable.[5] Congress cannot be presumed to have intended these results.

The court of appeals' decision also casts a shadow over application of the Pelly Amendment to other international conservation programs, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087.[6] The reasoning of the court of appeals' decision could require certification of foreign countries in every instance in which they permit endangered species trade proscribed by CITES, regardless of the impact of

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[5] For example, if the IWC voted to prohibit all aboriginal subsistence whaling for various stocks of whales, both Alaskan and Greenland natives would be affected. The United States and Denmark (on behalf of Greenland) might enter objections, concluding that the prohibition was unnecessary. Under the court of appeals' construction the United States would be required to certify Denmark even as it permitted its own natives to continue their traditional activity.

[6] CITES represents a broad conservation effort, supported by 82 signatory nations, controlling international trade in more than 1,000 species from marine, freshwater, and terrestrial environments. As previously noted (see note 4, *supra*), a nation that lodges a reservation to the placement of a particular species on Appendix I (endangered) or Appendix II (threatened) and permits trade in that species without the required import and export permits is in the same position as a nation that objects to an IWC amendment of the ICRW Schedule and permits whaling in contravention of it.

that trade on the species or on the effectiveness of the treaty. We suspect that few nations—whether wildlife "producers" in Africa, Asia and South America or "consumers" in Europe and other continents—have CITES records so perfect that they are free from the possibility of sanctions under an automatic certification requirement. Certainly, Congress did not intend the Executive Branch to wage economic warfare upon the world community at the insistence of the courts. The court of appeals' decision would nonetheless encourage litigation seeking to compel the Executive Branch to impose in terrorem sanctions against every CITES transgression, regardless of circumstances.

The CITES situation is, of course, only one example of the type of mischief that the court of appeals' reasoning could generate. Indeed, the effects of the decision could extend beyond the realm of wildlife conservation. Congress has adopted other measures that authorize sanctions against foreign nations based on Executive Branch application of generally phrased standards.[7] Similar judicial intervention under those statutes, compelling the Executive Branch to take foreign relations actions based on finespun judicial definitions of "mandatory and nondiscretionary" duties, would inevitably inject the Judicial Branch into the conduct of foreign policy—an area traditionally entrusted to the President and Congress.

In sum, this case presents an important question of broad significance that merits this Court's review.

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[7] See, *e.g.*, 22 U.S.C. 2151n (providing for the cessation of aid to governments that engage in "gross violations of internationally recognized human rights").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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